AN ARGUMENT

In DEFENCE of the

MARRIAGE

OF AN

UNCLE

WITH THE

Daughter of his Half-Brother

By the FATHER's Side.

By *JOHN TURNER*,
Hoſpitaller of St. *Thomas Southwark*, and late Fellow of *Chriſt's College* in *Cambridge*.

Διὰ τίραν φρονῖδες σοφώτεραν.

LICENSED,
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In Defence of

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WITH

The Daughter of his Half Brother by the Father's Side.

THIS Caſe in Conſanguinity is exactly the ſame with that other in Affinity, which was formerly propoſed to me, when I writ my Reſolution of Three Matrimonial Caſes; in which having proved undeniably already, That Affinities and Conſanguinities are prohibited to the ſame Degrees, as well by the Levitical as the Civil Law, the Reſolution of that Caſe will of it ſelf determine this in Favour of the Marriage: but

but yet, for the more clear Demonſtration of the Truth, I will inſiſt more particularly upon it.

There are two things in my former Reſolution in which I have been very plain, and I do ſtill adhere to them both: The firſt is, That *ex antecedenti* I ſhould have been againſt a Marriage of this nature; the ſecond, That after ſuch a Marriage is ſolemnized in the Face of the Church, and conſummated by mutual Enjoyment, there can be no Divorce, no Separation admitted. To the latter of theſe I need add nothing further, but may acquieſce perfectly in what hath been already repreſented, which I think to be ſo full, and ſo pertinent to the purpoſe in all its parts, that I ſhould, and ſhall always look upon it, as one of the hardeſt Caſes I ever met with in my Life, if any Sentence of Divorce or Separation ſhould proceed againſt Parties in the Degree and Circumſtance there mentioned. But yet becauſe nothing can be too ſure in a matter of this moment, I deſire it may be further conſidered, That there is a known Maxim in the Civil Law, *Quod fieri non debet, factum valet*: Which according to the needs of Equity, and either publick or ſometimes private Convenience, branches it ſelf out into great variety of

Caſes.

Caſes. So *Varro* ſpeaks of a *Prætor*, who did *tria verba fari*, upon one of thoſe Days which By the *Roman* Laws and Uſages were *dies nefaſti*; and of a Magiſtrate who was *vitio creatus*, that is, in whoſe Election to his Office ſome of thoſe Ceremonies or Cuſtoms which the ancient Laws of *Rome* required, or long Preſcription had conſtantly put in practice, were omitted. But yet, notwithſtanding, if the *Prætor* did bolt out his *do*, *dico*, *addico* before he was aware, or by a pretended Ignorance, in ſtead of a real one; or if a Magiſtrate were choſen with ſome Irregularity, yet the *dies faſtus* ſtood good for all this, and ſo did any Legal Act which was done by the *Prætor* upon it, on the one ſide; and ſo did the Magiſtrate, though viciouſly elected, on the other. They are the Words of the aforeſaid *Varro*. *Contrarii horum* (faſtorum) *vocantur dies nefaſti. Per quos dies nefas fari Prætorem:* Do, Dico, Addico; *itaque non poteſt agi, neceſſe eſt aliquo eorum uti verbo, cùm lege quid peragitur. Quod ſi tum imprudens id verbum emiſit, aut quem manumiſit, ille nihilominus eſt liber, ſed vitio: ut Magiſtratus vitio creatus, nihilo ſecius Magiſtratus.* And yet it is to be conſidered here, That in the Caſe of a Magiſtrate, not duely Elected, for

Varro l. 5. de L. L.

for want of ſome Ceremonies or Modalities that ought to have been uſed; among the *Romans*, who were ſo ſtrangely fond of having every thing done *ritè*, or, as they ſometimes ſpeak, *rectè atque ordine*, and *more majorum*, there was a very ſtrong Current of rooted Superſtition and inveterate Prejudice againſt him; and in the other Inſtance of the *Prætor*, though the Legal Acts he did upon ſuch a day were firm and valid, yet himſelf was liable to a ſevere Cenſure. If he did it really out of ignorance or miſtake, he was to expiate for himſelf by a Treſpaſs-offering, as among the *Jews*; but if out of malicious wickedneſs, and of ſet purpoſe, there was no Expiation: For ſo the ſame *Varro* tells us in the Words immediately following thoſe I have laſt cited. *Prætor qui tum fatus eſt, ſi imprudens fecit, piaculari hoſtiâ factâ piatur: ſi prudens dixit*, Quintus Mucius *abnegabat eum expiari, & ut impium non poſſe dicebat.* Where when *Scaliger*, in his Learned *Conjectanea* upon the Place, would needs have *ambigebat* in ſtead of *abnegabat*; though he ſeems to have found it ſo in the *MS.* which he made uſe of, yet was he certainly miſtaken, and his Copy was falſe. For firſt, There is a vaſt difference betwixt theſe two Expreſſions, *ambi-*

gere

gere aliquem poſſe expiari, and *ambigere utrum aliquis poſſit expiari*; and the latter of theſe is *Latin*, the former is not. Secondly, This way of Reading will make the two Members of the Sentence to fall out with one another; for it follows immediately, *& ut impium non poſſe dicebat*; ſo that, it ſeems, he was at a great *nonplus* in the former part of the Sentence, and yet was very poſitive in the latter. Thirdly, If *Scaliger* had known who this *Mucius* was, and had compared this Place of *Varro* with another of *Macrobius*, he would have been out of doubt himſelf, and would not have ſuppoſed that *Mucius* was in any. For it was not *C.* or *Cajus Mucius*, as one of *Scaliger*'s Copies falſly repreſented it; but *Quintus Mucius Scævola*, who had as good reaſon as any Man to be poſitive in theſe Caſes; aud that he was ſo in this it ſelf, the Words of *Macrobius* are a ſufficient Proof. They are theſe. *Affirmabant* (not *ambigebant*) *autem Sacerdotes pollui ferias, ſi, indictis conceptiſque, opus aliquod fieret. Præterea regem ſacrorum Flamineſque non licebat videre feriis opus fieri, & ideo per præconem denunciabatur, nè*

Macrob. Saturn. l. 1. *c.* 16. Perhaps this was the ſame whom he calls *Q. Mucium jureconſultum*, *ib. l.* 1. *c.* 3. For there was a *jus Pontificium* as well as a *jus civile*, and among the *Pontifices* there is more than one *Scævola* to be met with in the *Roman* Story. See the ſame *Macrob. ib. l.* 2. *c.* 9. *p.* 295. *Ed. Pontani. v. & Liv.* 27. 8. *& in Epit. lib.* 56.

quid

quid tale ageretur; & præcepti negligens multabatur; præter multam verò affirmabatur (not *ambigebatur*) *eum, qui talibus diebus imprudens aliquid egisset, porco piaculum dare debere; prudentem expiare non posse Scævola Pontifex affirmabat.* For this same *Scævola* was but the Sirname of the Family, their Name it self was *Mucius* or *Mutius*; and how extremely exactly these two places agree, let any man be judge that shall compare them together: So that this may serve for one Instance of the great Caution and Prudence of the *Roman* Law, in not rescinding certain Acts that had been already past, the better to maintain the publick order and quiet, notwithstanding they were antecedently prohibited and unlawful, notwithstanding they thwarted their Prejudices or their Customs, and that the Persons by whose Intervention and Authority the said Acts had been passed, were severely punishable by the *Roman* Law.

Such another Case as this, is that which is mentioned by *Pompeius Festus* under the word *Sacer*; which he makes to signifie such a Person as was devoted to Destruction, and Excommunicate out of the *Roman* State, and denyed all the benefits and advantages of Life, yet he was not condemned to Death by any publick Sentence, so as to Die by the

the hands of the Executioner: but if any private Perſon happened to Kill him, either by chance, or of ſet purpoſe, he was acquitted by an expreſs Proviſion of the Law from any Puniſhment, notwithſtanding he had done what the Law did not allow him. *Homo ſacer is eſt*, ſaith *Feſtus*, *quem populus judicavit ob maleficium, neque fas eſt eum immolari; ſed qui occidit, parricidii non damnatur, nam lege Tribunicia primâ cavetur; ſi quis eum qui eo plebiſcito ſacer ſit occiderit, parricida ne ſit.* And this is the Second Inſtance. *V. Jo. Scal. in Conject. ad Feſt. p. 163.*

But Thirdly. *Livy* l. 10. c. 9. Speaks at the ſame rate of the *Valerian* Law. *Valeria Lex, cum eum qui provocaſſet virgis cædi ſecurique necari vetuiſſet, ſi quis adverſus ea feciſſet, nihil ultrà quam improbè factum adjecit, id (qui tum pudor hominum erat) viſum credo vinculum ſatis validum legis; nunc vix ſervo ità minetur quiſquam.* And this Law is expreſly applied to the *Matrimonial* affair by *Albericus Gentilis*, and by *Hugo Grotius*; and in the ſame place out of *Macrobius* he calls thoſe Laws by the name of *imperfectæ leges*, which forbid a certain Fact, but yet have aſſigned no Puniſhment to the offender; for ſo *Macrobius* ſaith towards the end of his Commentary, *in ſomnium Scipionis, inter leges illa imperfecta* *V. Alb. Gen. de Nupt. l. 4 c. 6. p. 403. & H. Grot. de j. B. & P. in not. ad l. 5. c. 5. ſect. 16.*

ſecta dicitur, in quâ nulla deviantibus pœnâ ſancitur; and he urges in the ſame place a reſcript of the Emperor *Marcus* to the ſame purpoſe. *Eum hæredem, qui prohibet Funerari ab eo quem teſtator eligit, non rectè facere, pœnam tamen in eum Statutam non eſſe.* Theſe paſſages of *Grotius* are in the Notes upon his excellent Treatiſe *de jure Belli & Pacis*, and the place he refers to is *l.* 2. *c.* 5. *ſect.* 16. where he hath theſe remarkable Words, which come ſtill cloſer to our purpoſe, concerning the poſſible validity of unlawful Marriages, where the Law it ſelf does not enjoyn a Divorce. *Imò etiam ſi Lex humana conjugia inter certas perſonas contrahi prohibeat, non ideò ſequetur irritum fore matrimonium ſi reipsâ contrahatur, ſunt enim diverſa, prohibere & irritum quid facere, nam prohibitio vim ſuam exerere poteſt per pœnam vel expreſſam vel arbitrariam*, (which is as much as to ſay, that where the Law does neither aſſign a determinate Puniſhment, nor leave it to the Diſcretion of him to whom the Cognizance of the Fact ſhall appertain; in this caſe there is no Puniſhment to be inflicted, neither can any legal Cognizance of the Fact be taken, and then he goes on) *Et hoc genus leges imperfectas vocat Ulpianus* (which agrees exactly with what hath been already Cited out

of

of *Macrobius*) *quæ fieri quid vetant ſed factum non reſcindunt; qualis erat Lex Cincia quæ ſupra certum modum donare vetabat, donatum non reſcindebat.*

So alſo in the Caſe of Marrying without conſent of Parents or Friends, it is the poſitive determination of *Paulus* in the *Digeſts*. *Nuptiæ conſiſtere non poſſunt niſi conſentiant omnes, id eſt, qui coeunt, quorumque in poteſtate ſunt:* and by *Harmenopulus*, and the Authors of the *jus Græco-Romanum* Publiſht by *Leunclavius*, ſuch Marriages without conſent are pronounced void: But yet the ſame *Paulus* in another place ſings plainly to another Tune, for in his Second Book of received Opinions, he ſaith thus, *non eſſe quidem Matrimonium contrahendum abſque voluntate parentum at contractum non ſolvi tamen*: in this opinion he is followed by *Cujacius* a man of great name in the Civil Law, notwithſtanding that *Albericus Gentilis* hath in vain endeavoured in this and other particulars to Blaſt his Authority and Reputation: And this Teſtimony of *Paulus* is the more remarkable, becauſe he puts it down *inter Sententias receptas* among the *received Opinions* of the *Lawyers* of his time, ſo that it was as good Law, and as commonly recevied, as any in that Age wherein this *Paulus* lived, which was be-

L. 23. tit. 2. *de ritu Nuptiarū.*

V. Omninò etiam B. Briſſon. de jur. Connub p. 75.

fore the *Digeſts* were compiled, for many of thoſe Deciſions are laid at his Door as their Author; nay, both of theſe Determinations, however inconſiſtent they may ſeem, are to be met with in the *Digeſts* of *Juſtinian*: All the queſtion is, how to bring him in this Caſe to a tolerable agreement with himſelf; and this cannot otherwiſe be done, but by interpreting the former place of the *Solennia Nuptiarum*, as ſome of the *Civilians* do; for the Marriage in this Caſe could not be ſo Solemn or ſo Publick, as when the Conſent of Friends was firſt obtained, and it is probable for the greater Secreſie, that many Nuptial Rites were omitted. Or elſe Secondly, That if the Parents or Friends *quorum in poteſtate conjuges antè nuptias fuiſſent*, ſhould ſtill perſiſt in their Averſion to the Match, as well after it was actually Conſummated, as before; for want of a Settlement on the one hand, or Dowry on the other, the Marriage out of perfect neceſſity might be diſſolved. But as for the latter *Pandects* of the *Græcian Empire* they are not to be hearkened to, they being as ſcrupulous in their Prohibitions as the *Cannon Law* it ſelf, which was ſo very much that *Cujacius* complained of it in theſe words, *nimia in nuptiis coercendis coarctandiſque poſteriorum urbis* Romæ

Cuja. ad Rub. de Conſang.

Pon-

Pontificum ſeveritas parum abeſſe videtur à nuptiarum prohibitione perpetuâ.

It is an undeniable Argument that theſe two maxims of the ſame *Paulus* are ſome way or other reconcileable to one another, not only that they are both owing to the ſame Author, but that they were both confirmed by the *Imperial* Sanction, which would otherwiſe by this means be flatly repugnant and contradictory to it ſelf; wherefore the plain truth of the Story, as I take it, is this, a Son being Married without his Fathers conſent, he would not contribute any thing towards his Maintenance; and in the Caſe of a Daughter doing the ſame thing, all manner of Portion or Dowry was denyed: The reaſon of which being demanded by the *Plaintiff*, the *Defendant* made Anſwer, *quia ſine conſenſu Parentum vel eorum in quorum poteſtate ſumus, Nuptiæ conſiſtere non poſſunt*; which was ſo far true, that, in this Caſe, the Parents or Friends of the contracting Parties were not obliged to do any thing for them, that is, though the Parties were lawful Man and Wife *ex poſt facto*, yet the proceeding was irregular, and the Relations were not bound to take notice of it, as of a lawful Marriage. (*a*) *Et*

(*a*) But yet if it appeared that the Parent did wrongfully detain his Son or Daughter from Marriage, his Conſent might be forced, and he compelled to give a Dowry by two ſeveral Reſcripts of *Severus* and *Antoninus*, C. *Tit. de ritu Nupt.* l. 19. D. l. 23. *Tit.* 3. *de jure dotium.*

ubi non eſt Matrimonium, ibi neque dos intelligitur, ſaith the *Civil Law*, or in the words of *Ulpian* which come a little nigher to thoſe of *Paulus* above Cited. *Dotis appellatio non refertur ad ea Matrimonia quæ conſiſtere non poſſunt: neque enim dos ſine Matrimonio eſſe poteſt: ubicunque igitur Matrimonii nomen non eſt, nec dos eſt.* And if a Woman had no Dower or Portion, which the Parent was not obliged to beſtow, if ſhe Married without his conſent before the age of *Five and Twenty*; for after that ſhe was *ſui juris* and might Marry Lawfully to whomſoever ſhe pleaſed, it was looked upon to be ſo diſgaceful and ignominious, that it was rather eſteemed *Concubinage* than *Marriage*; and ſo in this ſenſe alſo, we may perhaps ſay with *Paulus*, that *Nuptiæ conſiſtere non poſſunt, niſi conſentiant omnes, id eſt, qui coeunt, quorumque in poteſtate ſunt.* So *Plautus* ſpeaks in his *Trinummus*, in the perſon of *Callicles*. *Flagitium quidem hercle fiet, niſi dos dabitur Virgini:* And a little after in the ſame *Comedy*, in the perſon of *Lesbonicus*, who thus beſpeaks *Lyſiteles* that would have Married his Siſter without a Portion:

V. Briſſon. ubi ſupra.

——————*Nolo ego mihi te*
Tam proſpicere, quî meam egeſtatem leves:
ſed, ut inops, Infamis nè ſim, nè mihi hanc famam

famam differant, me Germanam meam Sororem in Concubinatum tibi ſine dote Dediſſe magis quam in Matrimonium, quis me improbior Perhibeatur eſſe?

Not that it was really *Concubinage*, for then no *poor Roman* could have been lawfully Married, but that it had a ſort of ignominious reſemblance with it, and was not unfrequently upbraided with that name.

Nay, as ſtrict as the *Canon Law* it ſelf is, yet *Gratianus* expreſly affirms Marriages without conſent after they are once actually Solemnized to be valid. For ſo he diſtinguiſhes *Conjugia* into *Legitima & rata*, *Legitima & non rata*, and *non Legitima & rata*, and under the laſt of theſe Heads he puts down Marriages without conſent, though this indeed, whatever may be ſaid of *Gratianus* his private Opinion, cannot poſſibly be reconciled with many other expreſs determinations of the *Canon Law*. The reaſon given by *Paulus*, why Marriages though without conſent, ought notwithſtanding to be valid, is taken from the publick intereſt, which ought to be preferred before the private diſpleaſure of non-conſenting Parents or Friends, to which though *Albericus Gentilis* make anſwer, by applying to this Caſe a ſcrap of *Tully*, *Reip. expedit pios habere Filios erga Parentes*, C. ult. [illegible] q. 1.

yet conſidering the number of ſuch Marriages, which will unavoidably happen, it being impoſſible to ſet a Bar to Concupiſcence, where there is no *notional prejudice* againſt the Contract, as in the Caſe of *Inceſt*, it highly concerns the Publick that ſuch Marriages ſhould be valid, becauſe of the great diſturbance that might happen by reſcinding them; and becauſe it is morally impoſſible by this expedient to prevent ſuch Marriages for the future; for Love of all others is the moſt violent and ungovernable Paſſion, and there is a great deal of reaſon in that ſaying of *Quintilian*, *Nunquam libertas tam neceſſaria quam in Matrimonio eſt, nam quis amare alieno animo poteſt?* Wherefore the *Civil Law* of *Rome* did never make ſuch Marriages *ipſo facto* void, but only left it to the Parents or Friends to conſider with themſelves, what was fit for them to do, and whether ſuch Marriages after they were Conſummated ſhould be Ratified and Confirmed or no. And this in *Parents* or thoſe that were *Parentum loco*, proceeded from the abſolute and unaccountable power, which by the old Laws and uſages of *Rome*, all Parents had over their Children, which extended as far as to the power of Life and Death; and in the Caſe of Marriage, they could not only null and make void a Marri-

age without consent, but which is still more, though Marriage were actually Consummate by the consent of all Parties, yet it was still in the power of the Parents to seperate the Man and Wife as they pleased, as is evident by several Testimonies of Antiquity produced by *Albericus Gentilis* out of *Plautus*, *Cicero*, and *Terence*, though it is true he expound them chiefly not of the *Roman* but the *Græcian* Practice, and this not without some appearance of Reason; but yet this power being manifestly included within the greater power of Life and Death, I see no reason why we may not apply these Testimonies to *Rome* as well as to *Greece*: But however it is certain that the latter Laws of *Rome* lookt upon this to be too great a power, and a power, which perhaps experience had shewed them, was too frequently abused, and therefore took care that no Marriage which was Ratified by Solemn Consent, should after that become void, upon every caprice or displeasure of the Parents: and though all Marriages without consent were *Illegal*, yet by the *best Lawyers* they were declared *valid*, because of the detriment that would accrue to the publick, as well as to private Persons by rescinding all Matches of this nature. Ulpianus *quidem certè*, saith *Brissonius*, *benè concordan-*

Lib. 4. de nupt. c. 6. p. 411, 412.

De jure Connub. p. 75.

tia matrimonia jure patriæ poteſtatis turbarì non poſſe, patrique interdicto ſibi filiam exhiberi deſideranti perſuadendum, nè acerbe patriam exerceat poteſtatem ſcribit, imò verò de uxore exhibendâ ac ducendâ patrem etiam qui in poteſtate eam habeat, a marito rectè conveniri poſſe. Hermogenianus *auctor eſt, interdicto quoque ſuccurri marito cujus uxor invita a parentibus detinetur* Impp. *reſcripſere, ex illo verò generali* Ulpiani *axiomate, quo benè concordantia matrimonia jure patriæ poteſtatis non eſſe turbanda definit, interpretationem meo quidem judicio accipit, quod* Paulus in lib. Sententiarum *ſcribit, eorum qui in patris poteſtate ſunt, ſine voluntate ejus matrimonia jure non contrahi, ſed contracta non ſolvi.* St. *Ambroſe* in his Epiſtle to *Siſynnius*, commends him very much for not diſſolving his Sons Marriage, though it were without his conſent; and he gives ſuch a reaſon againſt a Divorce, as may extend to many other Caſes: *Acquiſiſti Filiam*, ſaith he, *ſine electionis periculo, ſi bonam duxit, tibi acquiſivit gratiam, ſi erravit, recipiendo meliores facies, refutando deteriores.* And certainly there ought great tenderneſs to be uſed in all the Caſes of *Matrimony Conſummate*, that two that have an entire and hearty Love for each other, and for that reaſon cannot brook a Divorce, may

S. *Ambroſe* Ep. 42.

may not be rendred desperate by a violent separation. *Albericus Gentilis* himself confesses that it is cruelty for the Parent in this Case to insist too much upon his right; but there can be no Cruelty without Injustice, and therefore that Marriage which it is unjust to make void, must needs be valid in its own nature. The same was likewise the Case of two that had been actually parted, they could not come together again without their Parents consent, as appears by this passage of *Ulpianus*, *Nuptiæ inter easdem personas nisi volentibus parentibus renovatæ justæ non habentur.* But yet notwithstanding if the Parties persisted in it, this Marriage must be valid for the same reason with those in the former Case. There was also required the *Consensus eorum qui coeunt*, as well as *eorum in quorum potestate erant*, the Consent of the *Parties* as well as of the *Parents*. And this besides the Law already produced, is the express determination of *Terentius Clemens*, *non cogitur filius familias uxorem ducere.* But yet such a forc'd Match whenever it was Consummate was valid, according to this of *Celsus*, *Si patre cogente duxit uxorem, quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur, maluisse hoc videtur.*

De Nupt. c. 7. n. 419.

L. 1. tit. de ritu Nupt. l. 18.

Ib. l. 21.

Ib. l. 22.

And

And to apply what hath been here ſaid to our preſent Caſe: If the Law be ſo tender of the Band of Matrimony, where the Parties Contracting are guilty of a *wilful violation* of one of the Præ-requiſites in order to it, as there is no Man or Woman that Marries without the Conſent of Parents or Friends, but knows very well in the firſt place, that he or ſhe do's really do it; and in the ſecond, that this ought by no means to be done; and that, beſides that the Law requires and expects this Conſent, they themſelves in the ſame Circumſtance ſhould take it very ill, to have their Children or neareſt Relations committed to their Charge, Marry without or contrary to their Advice and Counſel, how much more tender and favourable ought it then to be to the Matrimonial Band, where the Parties Contracting in a Degree not declared to be prohibited by the Law it ſelf, but only inferred by Proportion or by Parity of Reaſon, may very well be ſuppoſed to be ignorant, that what they did, was any Sin againſt God, or any Offence againſt the Law of the Land? If either of them be but ignorant, it is ſufficient; for the Party acting in ſimplicity and truth, ought not to ſuffer for the Preſumption of the other: and therefore the Marriage muſt remain indiſſoluble

diſſoluble and valid on both ſides. And as to the particular Inſtance here before us, when it is no where expreſly prohibited by Act of Parliament, certainly it muſt needs appear a very hard Caſe for two Parties to be violently ſeparated from each other, both of which, but eſpecially the Woman, may very well be ſuppoſed to have come together without any the leaſt ſcruple or miſpriſion of Offence, and without having ever thought of, or in the leaſt ſuſpected any of thoſe pretended Conſequences and Deductions which the Adverſaries of ſuch Marriages would charge them withal: When yet the moſt Learned of the *Jews* themſelves, who ſpent their whole time in the Study of the *Levitical* Law, and who have prohibited many other Degrees, beſides what the *Code* of *Moſes* do's expreſly mention, who are ſcrupulous even to all the nicety and fondneſs of Superſtition it ſelf, in the obſervance of the *Moſaic* Sanctions, yet could never diſcern, nor have ever given us the leaſt intimation of the Marriage of an *Uncle* with his *Niece* being forbidden. For *Maimonides* and the *Talmudiſts* divide the Matrimonial Prohibitions into *Harâjoth* and *Sheniioth*, by the firſt underſtanding the *Prohibitions expreſt*, and by the ſecond, ſuch as are *implied* by Parity

V. Seldan. Ux. Hebr. l. c. 1, 2. & de Jur. Nat. & Gent. juxta Diſcipl. Hebræor. l. 3. c. 1. & Buxtorf. Fil. de Sponſal & Divort. c. 9. ad 37.

Parity of Reaſon, though they are not expreſly ſet down; and they take no manner of notice under the ſecond of theſe Heads, for it was impoſſible they ſhould do it under the firſt, of the Marriage of the *Uncle* with his *Brother* or *Siſters Daughter*. I do not ſtand much upon the Judgment of the *Jews*, either in their Interpretations of the Text, or in their Inferences from it; but yet I ſay, it is very hard, nay, it is almoſt palpably unjuſt and cruel, that a Divorce ſhould proceed by virtue of a pretended Violation of the Law *Levitical*, in a Degree which neither the *Act of Parliament* hath expreſt, nor the *Jews*, the wiſeſt and the learnedeſt of them, he whom they call the *Talmud* and the *Chacham*, did ever believe to be imply'd; but, on the contrary, they expreſly allow'd, I do not ſay, diſpenſed with Marriages of this nature, and there are ſeveral Inſtances of them to be met with in the *Jewiſh* Story: Certainly it muſt needs be a Conſequence which do's not lie very plain; (and ſuch cannot be ſuppoſed to come within the Obligation of a Law) which ſo many *celebrated Rabbins* and diligent Inquirers into the Meaning of the Law of *Moſes*, could not after all their Search and Induſtry diſcern.

V. Grot. de J. B. & P. l. 2. c. 5. ſect. 14. & in Annotatis ib.

Again, If in the opinion of *Celſus* above-recited,

recited, which Opinion was paſt into a Law by the Sanction of *Juſtinian*, a Marriage which is forced upon the Parties Contracting by Threats or Hardſhips from their Parents or Friends, ſhall yet notwithſtanding be valid, becauſe of the great Inconveniencies that follow from an unneceſſary untying or cutting aſunder the Matrimonial Knot; how much more ought Marriage to be Sacred, where the Contract is entred into by mutual Inclination, the Marriage Solemnized by Law, Conſummated by Enjoyment, made every day more pleaſing and delightful by a ſtrict Friendſhip and inviolable Union, by mutual Condeſcenſions, Careſſes, and Obligations, from whence the Nuptial Rites receive a Confirmation of Nature, by an Harmony of Love and Sympathy with and for one another, extrinſique to any thing of Covenant or Bargain?

What hath been ſaid of *Marriages without Conſent*, which yet notwithſtanding were valid by the *Civil Law*, the ſame was likewiſe true of *Clandeſtine* Marriage, and Marriage of a *Chriſtian* with an *Heathen* or *Pagan*; both of which were forbidden by *Imperial* Reſcripts, but yet were valid notwithſtanding *de futuro*, although *ex antecedently* prohibited and unlawful. *V. Alberic. Gentil. ex Cujacio l. 4. de Nuptiis, c. 6. p. 414.*

But

But to come up ſtill nearer to the Inſtance before us; *Grotius* hath this remarkable Paſſage in his Book *de Jure Belli & Pacis: Sed ſciendum eſt, non quod vetitum eſt fieri lege divinâ, irritum quoque eſſe, niſi & hoc lex addiderit aut ſignificaverit. Canon* Eiliberinus LX, *ſi quis poſt obitum uxoris ſuæ ſororem ejus duxerit, & ipſa fuerit fidelis, per quinquennium eum à communione abſtinet: eo ipſo oſtendens manere vinculum matrimonii. Et ut jam diximus, in Canononibus, qui* Apoſtolici *dicuntur, qui duas ſorores duxerit aut fratris filiam, tantum Clericus fieri prohibetur.* From which Paſſage it is plain in the Judgment of this Great Man, what hath been already proved from ſeveral expreſs Teſtimonies out of the *Civil Law*, not only that that Fact cannot be puniſh'd by any Legal Sentence, which is only implied obſcurely to be forbidden, but no where expreſly declared to be ſo; but that even in caſe of a ſimple Prohibition, without a certain Puniſhment or Forfeiture aſſigned, no ſuch Forfeiture can in this Caſe be incurred, nor any ſuch Puniſhment inflicted: Wherefore the Marriage of an *Uncle* to his *Niece* being no where prohibited by any poſitive *Levitical* Decree, and much leſs having any Puniſhment allotted to it, it cannot be puniſh'd by any

L. 2. c. 5. ſect. 14. para. 4.

any *Judicial Sentence*; for we muſt either ſay, That Divorce is no Puniſhment though with reſpect to the Relation betwixt Man and Wife, it be certainly the heavieſt of all other, becauſe it perfectly deſtroys and evacuates that Relation; or elſe, That a Divorce betwixt Perſons Married in this Degree, is abſolutely and undoubtedly unlawful, upon account of any ſuch Relation.

Further, Though I readily grant the Prohibitions of *Leviticus* to proceed all of them upon the Meaſures of Nature, yet though the Laws are Natural, the Sanction of them is Poſitive, and no more: For God might have aſſigned other Puniſhments if he had pleaſed, as Servitude, hard Labour, Ignominy, Fine, Confiſcation, Impriſonment, the loſs of any Limb or Member, or any other Puniſhment ſhort of Life it ſelf, without any manner of diſparagement to his Juſtice, or any violation of the Laws of Nature. Wherefore in ſo great variety of poſſible Infliction, what Puniſhment can we aſſign as an Act of Obedience to the *Levitical* Law, when that Law it ſelf hath not aſſigned any?

Adultery by the Law of *Moſes* was puniſh'd with Death in both Parties; but by ours it is not ſo: Which is a plain Argument, whatever may be ſaid of unlawful Marriages

Marriages and unlawful Luſts, in which we are governed by the *Levitical* Meaſures, yet, as to the Puniſhments conſequent upon them, we have Meaſures of our own; and therefore where no Puniſhment is expreſly determined by our Law, or at leaſt expreſly left to the Diſcretion of the Judge or Court, or of any other Perſon or Perſons to whom the Cogniſance of the Matter ſhall appertain, in this Caſe no Puniſhment can lawfully be inflicted: How then can we with Juſtice proceed to a Divorce in caſe of ſuch a Marriage, as to which the *Levitical* Law is ſilent as well as ours?

So likewiſe in the Caſe of *Buggery*, or *Beſtiality*, it was Death without Mercy by the Law of *Moſes*; and ſo it is by ours made Felony without Benefit of Clergy:
Cap. 6. But this was not till the 25*th.* of *H.* 8. and if that or ſome other Statute of Proviſion had not been made, we muſt either ſay that that Act of Parliament was altogether fruitleſs, or elſe that it would not have been Capital to this Moment. Wherefore there being no Puniſhment expreſly aſſigned, or expreſly left to the Judgment and Diſcretion of any *Eccleſiaſtical Judge* by our Law, though it had been expreſly prohibited, and more than that expreſly puniſhable by the Law of *Moſes*, for a Man

to

to Marry with his *Niece*; yet notwithſtanding, it could not have been ſo by ours.

And to ſhew yet further that our Law does neither inflict any Puniſhment, nor remove it, though the Caſe be never ſo plain, without an expreſs Prohibition in that particular behalf, I will inſtance in two other things not yet mentioned; the firſt, concerning the Inſliction of Puniſhment; the ſecond, concerning the Removal of it. The firſt is of a *Clerk* convict of *Felony* or *Murther*, and after Conviction breaking Priſon. Concerning which, there is an Act in the 23*d*. of *H*. 8. the Preamble of which is in theſe Words. *Where divers Perſons being convict of Murther or Felony, having the Privilege of their Clergy, and delivered to the Ordinaries, afterwards wilfully break the Priſons of the Ordinaries, and eſcape their ways, doing and committing great, horrible, and deteſtable Offences: and as hitherto for ſuch wilful breaking of Priſons of Ordinaries by Clerks Convict, hath not been provided any great Penalty, whereby they ſhould ſtand in dread of doing the ſame; Be it therefore Enacted, &c.* After which follows the Body of the Act, by which ſuch Breach of Priſon for the future is made to be *Felony without Sanctuary or* Cap. 11.

Benefit of Clergy. From which Words it is plain, for I do not argue from the Act it ſelf, it being only a Repeal of 4 *H.* 7. *c.* 13. by which the Benefit of Clergy was allowed to Clergy-men as oft as they ſhould offend, That it is the ſenſe of the King, and his Three Eſtates aſſembled in Parliament, which is as much as to ſay, it is the Law of *England*, That no greater Penalty can be inflicted for any Crime, than what the Law hath expreſly determined; neither hath any Man reaſon to dread any Puniſhment, but what the Law hath denounced againſt his Offence. From which general Rule I cannot diſcern that there is any one Exception, unleſs it be in the Caſe of thoſe Puniſhments which are expreſly left to Diſcretion by the Law, which I am ſure is not the Caſe of an *Uncle* Marrying with his *Niece*; and therefore whether the thing be *Naturally* or *Levitically* Lawful or no, which I do not yet examine, it is certain, that a *Divorce*, which cannot be denied to be a *Puniſhment*, cannot *legally* enſue upon it.

The ſecond thing is this; Becauſe, generally ſpeaking, it was a Rule in Law, that he that killed another ſhould at leaſt incur the Forfeiture of his Goods and Chattels, it was therefore doubted in Parliament, whether

24 *H.* 8. *c.* 5.

ther he that kill'd a Thief in his own defence ſhould not forfeit his Goods: And this Doubt could not otherwiſe be determin'd, but by a definitive Sentence of that Auguſt Aſſembly, ratified by the King, by which it was declared for the future, That he ſhould not incur any Damage or Prejudice thereby. Now a Man would think this was a plain Caſe: Here was a *Thief* on the one hand, not only a *Criminal*, but a *Capital Offender*; and on the other there is *Self-defence*, a *real* and a *neceſſary Duty*, which the Laws of all Nations muſt needs be ſuppoſed to be very favourable and propitious to. It is a plain Caſe that here could be no *Guilt*, and therefore a Man would think no *Puniſhment* ſhould accrue: But, it ſeems, our Law was not of this mind; and there being a general Rule that all ſorts of *Manſlaughter* ſhould be puniſh'd with Forfeiture of Goods and Chattels, this, though the plaineſt and the moſt reaſonable Inſtance that can poſſibly be thought of, could not by any means be exempted out of it, without a definitive Declaration of the Legiſlative Power, by which all ſuch Forfeitures ſhould afterwards be remitted. So that nothing can be more evident, than that the Law of *England*, both in the Obligations which it lays, and in the Privileges and Im-

munities it confers upon us, do's not proceed by *Innuendoes*, Conſequences, and probable Intimations; but by expreſs, poſitive, and particular Decrees: And indeed if it ſhould do otherwiſe, the Inconvenience would be infinite, and the true Extent and Latitude of every Law uncertain.

The Law of *Moſes*, in the Twentieth of *Leviticus*, hath aſſigned no Puniſhment but that of *preſent death* in caſe of any Inceſtuous or Prohibited Conjunction; as will appear to any Man that ſhall look over that Chapter: there being no imaginable colour of doubt, unleſs it be *ver.* 17, 19, 20, 21. in the two firſt of which it is ſaid, he or they *ſhall bear his or their iniquity*; in the two latter, *they ſhall bear their iniquity*, *they ſhall die childleſs*: The ſenſe of which is certainly the ſame with, *they ſhall ſurely be put to death*, and *their blood ſhall be upon them*, in ſeveral other places of that Chapter; and by their being *childleſs* is meant, that the Sentence of Death and Execution of it ſhould immediately paſs upon them, without giving them time to propagate themſelves by their Iſſue. Now the Marriage of an *Uncle* to his *Niece*, if it be unlawful at all, being no otherwiſe than *conſequentially* ſo, becauſe that of an *Aunt* with her *Nephew* was forbidden, if it

be

be the *ſame Crime*, it deſerves the *ſame Puniſhment*; and conſequently, both Parties ſhould be put to death: But if it be not the *ſame* Crime, it is *no* Crime at all; for it is no otherwiſe inferred to be a Crime, but by a *pretended* Parity of Reaſon. Wherefore ſince it muſt needs appear extremely hard, and for that Reaſon unjuſt, to put a Man or Woman to death for the ſake of a Conſequence which he or ſhe might very well not foreſee, as none of the *Jewiſh Rabbins* appear to have done; and ſince there is no other or leſſer Puniſhment that can be inferred due by Parity of Reaſon, if any ſuch Parity indeed there be, it follows plainly, that the *Levitical* Law hath aſſigned no Puniſhment to this ſuppoſed Offence; wherefore the Law of *England* proceeding upon the *Levitical* Meaſures, cannot poſſibly inflict any: and therefore two Parties ſtanding in this Relation, are thus far at leaſt Marriageable by the Law of *England*, that after they are once Married, they cannot be Divorced.

I do not deny that there is a great deal of regard to be had to Parity of Reaſon, where this Parity or Potiority of Reaſon and of Degree meet together; as there is no queſtion but it is *Levitically* unlawful for a Man to lye with his *own Daughter*, or

with his *whole Siſter*, though neither of theſe are expreſſly forbidden: but it is forbidden for him to do the ſame with his *Daughters Daughter*, which is a Degree farther off; and with his *Half-Siſter*, who is but *half* ſo much a kin as the *Whole-Siſter*; for the *Whole Siſter* is really the *Half Siſter* and as much again; and therefore theſe things muſt be *Levitically* unlawful, if there be any ſuch thing as Reaſon or Obligation in the World; and if *nearneſs of Kin*, which is by much greater and ſtronger in the former Inſtances than in the latter, be, as it is poſitively declared to be, the Rule and Meaſure of *Levitical* Prohibition, beſides that the Practice of the *Jewiſh Church*, and of all Nations, from the time of *Moſes*, where any Matrimonial Prohibitions have obtained, hath conſtantly pronounced ſuch Marriages to be unlawful, and the Iſſue propagated from them, if any ſuch there ſhould be, to be ſpurious and illegitimate; which is ſo far from being true in our Caſe, that the latter *Jews*, at leaſt as far off as *Maimonides*, and ſo much further as the *Talmudical Doctors*, have concluded the Degree we are ſpeaking of to be Lawful; and I ſhall prove in the Sequel of this Diſcourſe, that though there be indeed a *Parity of Degree* between the Marriage of

of the *Aunt* with her *Nephew*, and that of the *Uncle* with his *Niece*, yet there is by no means a *Parity of Reaſon*.

It is likewiſe true, that the old *Roman* Laws did forbid the Marriage of the *Uncle* to his *Brother* or *Siſters Daughter*; and ſo it did likewiſe the Marriage of *Couſin-Germans*: and though the *latter Jews* have allowed both of theſe, yet I conceive the latter to be plainly prohibited in the Law it ſelf, and the former, though it be no where expreſly prohibited, yet, as I always thought, and do think ſtill, it ought to be amongſt us. It was probably avoided by the *ancient Jews*, for the Reaſon which St. *Auſtin* gives for the avoidance of Marriage with *Couſin-Germans*. *Factum etiam licitum propter vicinitatem horrebatur illiciti, & quod fiebat cùm conſobrinâ penè cum ſorore fieri videbatur:* And ſo here, *Quod fiebat cum fratris vel ſororis filiâ penè cùm amitâ vel materterâ fieri videbatur.* From the Practice of the *ancient Jews*, as I have intimated elſewhere, the *Romans* ſeem to me to have derived both of theſe, together with all other their Matrimonial Prohibitions; but this, though it may be an Argument *ex antecedenti* to weigh upon the Conſciences of the Parties Contracting, when they ſtand in this Relation to each other,

S. Aug. de C. D. l. 15. c. 16.

Latter concerning the Marriage of Couſin-Germans.

other, for a diſſolution of ſuch Contract or Matrimonial Agreement, by mutual and alternative Conſent; and though a *Caſuiſt* being conſulted, may make uſe of it, if he pleaſes, as a Topique of Diſſuaſion, to hinder any ſuch Marriage, if it may be done: yet a Contract being once made, it cannot otherwiſe be diſſolved, upon any ſuch indemonſtrable Suppoſition; and a Marriage being once Conſummated in purſuance of the aforeſaid Contract, this is no ſufficient ground for a *Judge* or *Court Eccleſiaſtical* to proceed to Sentence of Divorce upon, eſpecially conſidering, that though there were ſuch a *cuſtomary* Bar among the *ancient Jews*, which they did not *uſually* violate or tranſgreſs, yet this does not in the leaſt appear to have depended upon the Obligation of any Law, but only upon a *Reſemblance*, though not amounting to a *Parity* of Caſes, and upon *Modeſtinus* his Reaſon, upon which it is a matter not of Obligation, but Prudence, whether we will proceed or no, *ſemper in conjunctionibus non ſolum quid liceat conſiderandum eſt, ſed & quid honeſtum ſit*; and in all ſuch Caſes, though a Marriage ought not to have been entred into, yet it cannot with any face of Juſtice be diſſolved, becauſe it is ſuppoſed before-hand to be at leaſt barely Lawful.

D tit. De Ritu Nuptiarum, l. 42.

And

And now we are ſpeaking of the Marriage of *Couſin-Germans*, which I have proved already in my Papers upon that Subject to be *Levitically* prohibited and unlawful; and yet notwithſtanding I am clearly of opinion, as I always was, that all ſuch Marriages already Conſummate, ought in all Reaſon and Conſcience to be good and valid; and I ſuppoſe there is *no Lawyer* that is not of my mind: Is it not a very hard Caſe, if an *Uncle* and *Niece* Marrying ſhould be Divorced *violently*, without either of their Conſents, though neither the Law of *Moſes*, nor of *England*, have any where ſo much as mentioned their Caſe, and much leſs expreſly prohibited and forbidden it; when yet notwithſtanding *Couſin-Germans*, who are expreſly condemned in all ordinary Caſes by the Diſpenſation granted to the Daughters of *Zelophehad*, ſhall Marry as they pleaſe, without the leaſt Diſturbance, and without incurring any danger of Separation? On the other ſide, if all the *Couſin-Germans* now in being, who are engaged in Matrimony to one another, ſhould by the ſeverity of the *Law Eccleſiaſtical* be Divorced, what a preſent Diſturbance and Confuſion would it make? And how would it reflect upon the Deſcendents of ſuch Parents, who are much more

numerous

numerous than the other? And how then can it be equitable to diſſolve thoſe Marriages againſt which there lies no manner of *Legal* Proof, when thoſe that are ſo plainly excepted in the *Levitical* Law, unleſs in the Caſe there ſpecified to the contrary, which do's not belong either to our Age or Nation, ſhall not only be ſpared and pardoned for what is paſt, but without control allow'd and practis'd for the future?

I know it will be ſaid, notwithſtanding the Caſe of the Daughters of *Zelophehad*, That ſuch Marriages are not prohibited in thoſe Chapters of *Leviticus* where the Degrees prohibited are ſet down. But firſt, I ſay, This is by no means a fair Objection; for it is ſufficient if it be any where forbidden, and there is no queſtion but the *thirty ſixth* of *Numbers* is a Chapter of every whit as good Authority, as the *eighteenth* and *twentieth* of *Leviticus*; and unleſs it can be proved, that they any where contradict, they cannot poſſibly derogate from one another.

Secondly, If we conſider that theſe and ſuch-like Enormities were the declared Reaſons of the Deſtruction of the *Amorites*, and other Nations, which ſhews Inceſtuous Marriages, for ſome Reaſon or other, to have been very diſpleaſing to Almighty God;

God; therefore out of a juſt tenderneſs to diſpleaſe his Divine Majeſty, and provoke his juſt Wrath and Indignation againſt us, we ought to explain all theſe Prohibitions in the utmoſt Latitude which the Words will bear; that Interpretation which is certainly the ſafeſt, being in this Caſe alſo certainly the beſt. Therefore I would ask any Man, when it is ſaid, *Levit.* 18. 9. *The nakedneſs of thy Siſter, the Daughter of thy Father, or Daughter of thy Mother, whether ſhe be born at home or born abroad, even their nakedneſs thou ſhalt not uncover*; Whether the *Siſter born abroad* may not very rationally be interpreted of a *Couſin-German?* For the *Hebrew Idiom* is uſed to call all by the name of *Brethren* and *Siſters*, that are of the ſame *Blood* and *Kindred* with each other, as *Abraham* ſaid to *Lot* his *Brothers Son*, *Chi Achim anachnou*, *For we be Brethren*; ſo the *Romans* called them *Fratres patrueles*, *conſobrini*, *amitini*; and St. *Auſtin* ſaith, *Fratres appellantur & pænè Germani ſunt*; and *Aurelius Victor* ſaith of *Theodoſius Major*, That he did *tantum pudori & continentiæ tribuere, ut conſobrinarum conjugia vetuerit, tanquam ſororum:* And *Deucalion* ſays to *Pyrrha* his *Wife* and *Couſin-German* in *Ovid*,

S. Aug. ubi ſuprà. V. etiam Paul. Dia. l. 12. Append. ad Eutropium

O ſoror,

O ſoror, O conjux, O fœmina ſola ſuperſtes,
Cui commune mihi genus & patruelis origo.

And then for the Expreſſion of *born abroad*, nothing can ſuit more naturally than that does to a *Couſin-German*, who is *born abroad*, that is, in *another Houſe and Family*, and is not deſcended of the *ſame* immediate Father or Mother. I am not ignorant that there are other Interpretations, which I confeſs want not their ſhew of probability; and that this which I have laid down, being carried as far as it will go, will prove more largely than I intend it ſhould, that is, it will extend to a Prohibition of the *Uncle* with relation to his *Niece*, according to that of *Abraham* to his *Nephew Lot*, *We be Brethren*: For if a *Nephew* be a *Brother*, a *Niece* is a *Siſter*, and a *Siſter born abroad*. But here I deſire it may be conſidered, firſt, That by a *Siſter born abroad* it is moſt probable ſome *one* thing is underſtood, not *two* or *three* ſeveral Relations under *one*, which would make the Signification of this Law to be very confuſed, uncertain, and obſcure; therefore without ſome other apparent Reaſon to induce us to it, beſides what we meet with in the Law it ſelf, we are not to interpret any

Law

Law in this manner. Secondly, Though the Word *Sister* may be extended farther, yet it most properly signifies one that is born of the *same* Parents, *one* or *both*; and for the same reason, with analogy to the most strict and proper acceptation, a *Sister born abroad* will signifie rather a Relation *in plano* than *in declivi*, an *equal* and *collateral*, rather than an *unequal* and *descending*; so that this Interpretation which I have pitch'd upon, is, without any manner of prejudice or partiality, plainly preferreable before the other (a).

If any Man shall still further demand, What Punishment is allotted to the Violation of this Law against the Marriage of *Cousin-Germans*; it being unreasonable, as will be sure to be pretended, to make a Law without a Sanction to enforce Obedience to it? To this I answer, first, That this in *Humane Laws* is very certain, that when *no* temporal Damage or Inconvenience is proposed to Disobedience, the Law it self is a *nullity*, because a Man is still in the same condition, whether he obeys or no; or, it may be, he may get more by Disobedience against the Law, than by Compliance with it: But in *Divine Laws* the case is otherwise; for these, though no Punishment be expresly annexed to the Violation

of

(a) To this purpose it is remarkable, that the *Codex Græco-Romanus*, calls *Cousin-Germans* all along by the name of ἀδελφοὶ, that is, ὡς ἐξαδέλφοι, *Brethren born abroad.*

of them, yet beſides an Obligation of the higheſt Gratitude which is laid upon us to him to whom we owe our Being and our Preſervation, together with all the Comforts and Enjoyments of Life; beſides that he makes no Law, but what, without any Intereſt or Emolument accruing to himſelf, who is infinitely Happy and Bleſſed in his own Nature, is purely levell'd at the Good of his Creatures, and at the Happineſs of thoſe to whom ſuch Laws are preſcribed; beſides all this, his Right of Puniſhment do's not therefore ceaſe, becauſe he hath not expreſly denounced what the particular Puniſhment ſhall be, in caſe of the breach of this or that Prohibition; but, on the contrary, if we obſtinately and wilfully reſiſt what we believe to be his declared Mind and Will, though it be not enforced by any particular Sanction, we give him a Right of *Juſtice*, beſides that of his *Abſolute Sovereignty* over us, to puniſh us to what degree and in what manner he pleaſes; and we have the Terrors of Omnipotence before our Eyes, which are enough to terrifie the moſt daring Sinner, whenever he lays them ſeriouſly and attentively before him.

Secondly, There is a plain Inſtance of a *Levitical* Prohibition to which there is no Sanction

Sanction annext; *Levit.* 18. 18. *Neither ſhalt thou take a Wife to her Siſter to vex her, to uncover her nakedneſs, beſides the other, in her life-time*; as will appear by comparing this Chapter with the *twentieth*, where this Crime and its Puniſhment are not ſo much as mentioned. The *Jews* interpret this Place of two *real* and *proper Siſters*, in the moſt ſtrict acceptation of that Word; that is, *Siſters* by the *ſame common* Parent, either one or both; and they agree unanimouſly, that though it be not lawful to be Married to two Siſters together, yet that one after the other, there was no doubt but it might very ſafely and lawfully be done, becauſe the Reaſon of the Law is added, *to vex her in her life-time*. But in this I am by no means of the ſame Opinion with the *Rabbins*, there being ſo ſtrict a Parity of Reaſon againſt it. For the *Wives Siſter* is, as exactly as any thing can be, the very *ſame* Relation with the *Husbands Brother*; which being ſo ſeverely prohibited in all Caſes, but where the Propagating the Family, and the keeping the Inheritance in the ſame Houſe and Line is concerned, it is impoſſible to conceive otherwiſe, where nearneſs of Kin is the declared Reaſon and Meaſure of theſe Prohibitions, but where there is *exactly* the

V. Seldenum & Buxtorfium ubi ſupra.

the *ſame* nearneſs of Kin, there muſt alſo be *exactly* the *ſame* Obligation, upon the Conſcience of him or her that ſhall reflect upon it, at leaſt, though the Breach of that Obligation which is not ſet down *diſertis verbis* in the Law, may not poſſibly be attended with any Legal Effects. The *Canon* of the Council of *Eliberis*, already mentioned out of *Grotius*, did not certainly underſtand this Place as the *Jews* appear to have done, becauſe it expreſly prohibits the Marriage of *two Siſters*, though one after the Deceaſe of the other, upon the ſame Reaſon I have mentioned; for I do not perceive that there can be any other: But yet thoſe Fathers of the *Eliberine Synod* did not proceed to a Divorce upon this occaſion, but only baniſh'd the Husband ſo offending from the Communion of the Church for the ſpace of five years after his Conviction of any ſuch Offence; and the *Apoſtolical Canon* referr'd to by the ſame *Grotius*, which is the Nineteenth in *Number*, and, as I take it, comes within the compaſs of thoſe that have the Reputation of *Genuine* among Learned Men, and to be ſure was a *Canon* of *great Antiquity* in the Church, though it forbids the Thing, yet is nothing ſo ſevere in the Puniſhment of it; for it only debars the Offender from being

being of the Clergy, becauſe ſuch ought to give the greateſt Examples of Continence and Sobriety, but yet plainly intimating at the ſame time, that it would be highly commendable and Praiſe-worthy in others, not to engage themſelves in Marriages of this nature. And from theſe *two Canons* compared together, or indeed from either of them conſidered by it ſelf, we may make theſe three obſervations.

Firſt, We have very great and ſacred Authority to perſwade us that a Divorce was never practiced in the Antient Chriſtian Church, upon parity of reaſon, although that parity were never ſo plain, as I have ſhewn it in this Caſe to be ſo very exact that nothing can be more.

Secondly, That a conſideration was always had to the infirmity of Women, who generally ſpeaking, cannot be ſuppoſed to underſtand the niceties of Law ſo well as their Husbands may do, or might have done, and therefore in theſe two Canons, the Church did not think it reaſonable to inflict any Cenſure upon them.

Thirdly, * That notwithſtanding the ſeverity of the *Canon Law* againſt Bigamy, in the Clergy eſpecially, which ſeems to have been founded upon a miſtaken Interpretation

* But there was alſo another reaſon of this ſeverity, which I have inſiſted more largely upon in other Papers.

tion of this place of *Leviticus*, they taking *Sister* in this place for any woman in *general*, as indeed it ought to be taken, though not so as to make this inference from it, yet this was not first denyed to Clergy-men themselves; much less were they utterly debarr'd from Marriage, only they were forbidden to Marry *two Sisters* one after the other.

But, I confess, I do, and have of a long time understood this place as a Prohibition of *Polygamy*. The word *Sister* according to the *Hebrew Idiom* being coextended to all of the Female Sex among the *Jews*; because the latitude of obligation in any Law whatsoever, where there are not other particular and express restraints laid upon it, is to be taken from the extent of the reason upon which that obligation is founded, which in this place is, *to vex her in her life time*. Now if Competition, Jealousie, and Emulation, will cause Vexation and Strife among persons at never so *great a distance*, as well as among *Sisters*, then *Sister* in this place is of necessity to be expounded in a greater Latitude, then in its first and primary signification; but yet *Polygamy*, notwithstanding this, was sometimes practised without controul among the *Jews*, as indeed, there being no express punishment

niſhment aſſigned or left to the diſcretion of a Conſiſtory or Court of Judicature, this Law was a *nullity* in it ſelf, only being, as it was a Divine Prohibition, the Perſon offending wilfully againſt it, was left, without the Cognizance of *humane* Laws to the *Divine Juſtice* on the one hand, or *Mercy* upon his Repentance on the other. And that which gave occaſion, by giving ſome glance of encouragement to the breach of this Law, was that it had no Sanction annext; for not only an humane Law without a Sanction is a Nullity; but they might alſo reaſonably conclude, that that Law wch had no Sanction annext, though it would be the greater act of Obedience to comply with it; yet that God would not be ſo heavily offended with its breach, as with thoſe againſt which he had expreſsly denounced exciſion and certain Death; for that there ſeemed to be as much difference betwixt the heinouſneſs of theſe two Crimes, as there is betwixt Life and Death themſelves; wherefore they might perhaps pleaſe themſelves with an Opinion in this Caſe, that a Sin or a Treſpaſs Offering would make Attonement for them, and ſet all things right. However, this is certain, though *Polygamy* were expreſly forbidden in this place; yet there being no puniſhment annext to the Law it

ſelf, the *Jews* looked upon it, rather as a matter of Prudence than Obligation, and that whenever ſtriſe might be avoided by the good temper of two or more Women in the ſame Houſe, there *Polygamy* was next kin to lawful, and where no puniſhment of Divine inſtitution was annext, there they would not preſume to eſtabliſh one of their own, and therefore no Divorce by any publick Sentence, unleſs the parties had a mind to ſeparate from each other, was ever allowed upon the account of *Polygamy*, ſo tender were they of a Divorce, even in a Caſe that interfered with an expreſs proviſion of the Divine Law, and perhaps the true reaſon why God annext no puniſhment to the violation of this Law, was becauſe *Polygamy* where it produces ſtriſe, is ſufficiently puniſht by it ſelf, which none of the other Prohibitions are, any otherwiſe than by the inward ſtings of a relenting Conſcience, which the offender before hand may very well be ſuppoſed to have loſt, let them be violated never ſo often. Neither was the *Chriſtian Law* leſs tender of a Divorce, in the Caſe of *Polygamy* with reſpect to ſuch parties, as had engaged in it, before they became Diſciples and Converts to Chriſtianity, then the *Jewiſh* was, though, after our having once embraced that holy Profeſſion,

feſſion, it is not only unlawful, *ex antecedenti*, but a Divorce ought to inſue at *leaſt*, beſides what other puniſhment the Civil Laws think reaſonable to inflict, after ſuch *Polygamy* is actually engaged in, not only becauſe of the *general deſign* of Chriſtianity, which aims much more earneſtly at all the higheſt inſtances of Charity and good will, than the *Jewiſh* diſpenſation did, and therefore the ſtate of *Polygamy* which is a natural occaſion of ſtrife, from which no man can be perfectly ſecure, can never be a lawful Chriſtian State, but alſo becauſe the *Union* of the Husband to *one* Wife, as one and the ſame Fleſh, is declared to be a Symbol of the *inſeparable* Union of *Chriſt* and *his Church*, and of the *intire* and *incommunicable* Love of the one to the other: And on the other hand *Polygamy*, by the rule of contraries, is a Symbol of *Polytheiſme*, or of the Worſhip of *many* and *falſe Gods*, which is the moſt directly oppoſite to Chriſtianity that any thing can poſſibly be conceived to be. Wherefore if the Law of *Moſes*, and if the Chriſtian Diſpenſation it ſelf were ſo extremely tender of a Divorce in this Caſe, notwithſtanding it was a plain diſobedience to an expreſs Divine Prohibition, how much more tender ought it to be in this Caſe, where there is not only no

See my reſolution of three Matrimonial Caſes toward the latter end.

puniſhment aſſigned, but alſo no expreſs Prohibition to be found, and where the breach of Charity, the honor of Chriſtianity, and the incommunicable reſpect and Service due to the true and only God, are the two firſt of them not ſo much, and the latter not at all concerned.

But Thirdly, I ſay, the Marriage of *Couſin-Germans* is expreſly threatned even with Capital Puniſhment, *Levit.* 20.17. in theſe words, *If a man ſhall take his ſiſter, his fathers daughter or his mothers daughter, and ſee her nakedneſs, and ſhe ſee his nakedneſs, it is a wicked thing; and they ſhall be cut off in the ſight of their people*, which place is manifeſtly parallel to *Chap.* 18. 9. where I have ſhewn the word *Siſter* to be taken in this latitude, at leaſt by a poſſible interpretation, which I have ſaid, and ſhewn good reaſon for it, is in theſe Caſes the *ſafeſt*, and conſequently the *beſt*. Beſides, that *Æſchylus* in his ἱκετίδες, as I have elſewhere obſerved, refers manifeſtly to the ſtory of the Daughters of *Zelophehad*, and the whole Play is little or nothing elſe but a continued harangue, and a perpetual, uninterrupted Declamation againſt the *Inceſtuous* Foulneſs of the Marriage of *Couſin-Germans*: And *Theodoſius* the Firſt, who puniſht this ſort of Marriage with *Burning*, *Proſcription* and the

the *declared illegitimacy* of the offspring derived from it, did without queſtion take his Copy from more *Antient times*, and probably at the long run from the *Jews*, among whom the parties ſo offending were to be cut off in the ſight of their people; for that general expreſſion is indifferent in it ſelf, whether it be determined to Burning or to any thing elſe, and this was expreſly the Puniſhment of Incontinence with a *Wife* and her *Mother*; *Ver.* 14. of that Chapter. If therefore thoſe Marriages ſhall be diſpenſed with, which were ſo plainly Prohibited by the Law of *Moſes*, with what Face can we Divorce thoſe which are not any where Prohibited at all, or ſo much as any where taken notice of or named?

If it be ſtill further demanded, how can it appear rational to any man to ſuppoſe that the Law of *Moſes* ſhould be ſo extreamly ſevere againſt the Marriage of the *Aunt* and *Nephew*, as to puniſh it with preſent Death, *Lev.* 19. 20. and yet ſo very gentle and favorable to that of an *Uncle* with his *Niece*, as to take no Cognizance, no notice of it, much leſs to puniſh it with any thing of rigor, notwithſtanding there be ſo *exact a parity of degree* in both theſe Caſes, the one being only as it were the reverſe of the other?

*To this I anſwer, in the firſt place, what I have already affirmed, and ſhall more largely demonſtrate by and by, that though there be indeed a *parity of Degree*, yet there is not a *parity of Reaſon*; for the *former* of theſe may very well be without the *latter*, though the *latter* cannot be without the *former*: There cannot be a *parity of Prohibition* where there is not the *ſame nearneſs of Kin*, but there may be the *ſame nearneſs of Kin* where there is not a *parity of Prohibition*.

Secondly, I ſay, where there is not a parity of *Reaſon*, though there be a parity of *degree*, that is, the ſame diſtance from a common Parent by Conſanguinity or Affinity of the *Uncle* and the *Aunt*, and of the *Nephew* and *Niece*, yet notwithſtanding the Caſe is not the ſame; but the *Uncle* and *Niece*, though not by diſparity of *Affinity* or *Blood*, yet by a manifeſt diſparity of *Reaſon*, are really a degree lower then the *Aunt* and the *Nephew*, for there can be no *diſparity* without a *gradation*, and in every *compariſon* there muſt be a *degree*.

Thirdly, That Marriage cannot be Divorced by virtue of any *Law*, or by virtue of any pretended *Conſequence* or *Deduction* from it, which is neither expreſly forbidden in it*ſelf*, nor ſtands in the ſame *rational parity* with

*By this Paragraph I deſire I may be underſtood, as to what I have ſaid above concerning the *ſame nearneſs* of Kin, in the Caſe of a man Marrying two Siſters, or a woman two Brothers one after the other; for it is plain, that there is not only a parity of degree but of reaſon alſo, otherwiſe I conceſs, if either of theſe had failed, my argument there would have been very inconclusive.

with that which is: but is a degree lower, tho not in Affinity or Conſanguinity, yet in the nature, in the reaſon of the thing, in the equity of the Caſe, and in the conſtruction of Law.

Fourthly, The *Jewiſh* Law was ſo tender of the Matrimonial Band, or of that mutual Vow of Cohabitation, and reciprocal enjoyment, which a Man and Woman had entred into with each other, that it never ſeparated any Marriage by a Divorce, where the Man and Woman were willing to live together; if the Man hated his Wife, or otherwiſe had any juſt cauſe of Impeachment or Accuſation againſt her, he might write her a Bill of Divorce and put her away as he pleaſed; and as the firſt of theſe proceeded out of a wiſe and juſt regard to the ſacred and inviolable obligation of the Matrimonial Contract, ſo the laſt was a Relique of that abſolute and arbitrary power which the Husband had over his Wife to diſpoſe of her, and do with her as he thought fit, by the Antient Laws and Uſages of the Eaſt, and the laſt of theſe duly reflected upon, might ſerve for a leſſon of obedience to the Women towards their Husbands, upon whoſe diſcretion they did ſo entirely depend, and at whoſe diſpoſal they were in ſo very abſolute and uncontroulable a manner; the

firſt might read a Lecture of Conſtancy to the Men, ſince it appeared by it, how exceeding tender God Almighty was of diſſolving the unity betwixt Man and Wife, by his not having made any proviſion without the conſent or deſire of at leaſt one of the parties, for any ſeparation, whilſt they lived, between them.

Wherefore to bring the matter home to the inſtance before us, in caſe of an *Inceſtuous* Marriage, the Law not allowing any *violent ſeparation* unleſs it were by *Death*; it was neceſſary either that the parties ſo offending ſhould yet notwithſtanding be ſuffered to Cohabit together, or that they ſhould be parted by the infliction of a *Capital Sentence* on both ſides, ſince they had both of them equally offended. The Law knew no other puniſhment for *Illegitimate* Marriages but *Death*, and therefore the Marriage which was not *Capital* was no offence at all againſt it, and had no puniſhment at all aſſign'd, but was as Legitimate to all intents and purpoſes as any other Marriage in the World could be. If then this Marriage of the *Uncle* to his *Niece* be ſo far from being expreſly puniſht by the Law of *Moſes*, that it is not any where ſo much as mentioned among the *Levitical* Reſtraints and Prohibitions, if it be the hardeſt Caſe

in Nature, to put a Man and Woman to death fon a *Conſequence*, a *real* or a *pretended* Parity of Reaſon, which either he or ſhe, or both of them, might very well not foreſee or underſtand; and if at laſt there be *no Conſequence*, no *Parity* in the Caſe, then it follows plainly, that the Marriage of the *Uncle* to the *Niece* is ſo far *legitimate*, that it was not at all puniſhable by the *Levitical* Law, and that it cannot be diſſolved by virtue of *any* Act of Parliament now extant among us, or by any other Power that will proceed either in Puniſhment or Prohibition upon the *Levitical* Meaſures.

Fifthly, As there was no *legal* violent Separation among the *Jews* but by *Death*, ſo the Reaſon why *Death* was inflicted, ſeems to be, to prevent any *Iſſue* from ſuch Inceſtuous Conjunctions; or, in the Language of the Law it ſelf, that they might *die childleſs*; the Woman for endeavouring to bear, and the Man to beget at once a *ſpurious* and *inceſtuous* Offspring: For a *Baſtard*, as it is every where a Name full of reproach, ſo among the *Jews*, he that was deſcended of an unlawful Bed, was looked upon as an *accurſed*, abominable thing, and branded with ſtill more peculiar and particular Marks of Ignominy and Deteſtation;

on ; and the Deſcendants from him, as far as to the Tenth Generation, were not to enter into the Congregation of the Lord, *Deut.* 23. 2. and this, though it ſhould happen, as it did for the moſt part, to be the Effect of no more than *ſimple Fornication:* And how much more deteſtable muſt ſuch a *Baſtard* needs be who was the Offspring of *Inceſt* and of *Whoredom* (for ſuch ſort of Marriages were eſteemed no better) in a moſt execrable *Conjunction* and *Combination* together?

But now it is certainly a very hard Caſe to make any Man a *Baſtard* by Parity of Reaſon, becauſe his Father and Mother hapned to do ſomething, which it was impoſſible for him to hinder, which is like another thing which is forbidden; much leſs is there any *Baſtardy* in ſuch a Caſe where the Parity of Reaſon do's not hold; and where ever the Offspring is not *ſpurious*, the Marriage is *legitimate:* For a *legitimate* Son or Daughter cannot poſſibly be deſcended, but of *legitimate Parents.*

Sixthly, Since all Mankind are deſcended of *one* common Parent, the propinquity of Blood or Kindred which is a Bar to Marriage, muſt of neceſſity ſtop ſomewhere, or elſe there can be no ſuch thing as Marriage in the World: And St. *Auſtin* thinks

thinks it very requiſite, that before the Names of Kindred are worn out, which do not extend very far, there ſhould be a return back again to the ſame Family, by two of the Relations Marrying one another: For ſo he ſaith, *Fuit autem antiquis patribus religioſæ curæ, nè ipſa propinquitas, ſe paulatim propaginum ordinibus dirimens longius abiret & propinquitas eſſe deſiſteret, eam nondum longè poſitam rurſus matrimonii vinculo colligare, & quodammodo revocare fugientem:* And not only by the Law of *Moſes*, but by the *Theodoſian* Law concerning *Couſin-Germans*, the next Degree to that which was *Capital*, was *no* Crime at all; for it does not appear that he forbad *Second Couſins* to Marry, though I believe the moſt ancient Prohibition, or at leaſt the moſt ancient Practice of abſtaining, to have extended ſo far both among *Jews* and *Romans*; and among the *Jews*, where there was no *medium* in theſe Caſes betwixt *Impunity* and *Death*, it is no wonder to find two Caſes that have a *Parity of Degree*, when we ſpeak of *Conſanguinity* or *Affinity*, ſo long as they have not a Parity of Reaſon, (ſo that one of them is in ſome ſenſe a real Degree lower than the other) the one of them to be puniſhed with *certain Death*, and the other *not* to be puniſh'd *at all*;

S. *Aug. de* C. D. l. 15. c. 16.

all; though, as I have ſaid already, more than once, I believe ſuch Marriages to have been very rarely practiſed among the *ancient Jews*, and that they might have ſaid of themſelves, with relation to the Marriage of the *Uncle* with his *Niece*, as St. *Auſtin* do's of *himſelf* and his *Contemporaries*, where he ſpeaks of the Marriage of *Couſin-Germans*; *Experti autem ſumus in connubiis conſobrinarum etiam noſtris temporibus, propter gradum propinquitatis fraterno gradui proximum: quam raro per mores fiebat, quod fieri per leges licebat, quia id nec divina prohibuit, & nondum prohibuerat lex humana: Veruntamen factum etiam licitum propter vicinitatem illiciti horrebatur.*

S. Aug. ubi ſupra.

The truth is, the Argument of St. *Ambroſe* againſt the Marriage of the *Uncle* with his *Niece*, preſſes the hardeſt of any other upon us, where, in his Epiſtle to *Paternus*, he ſays, *Quid eſt quod dubitari queat cùm lex divina etiam patrueles fratres prohibeat convenire, qui ſibi quarto ſociantur gradu? hujuſcemodi autem gradus tertius eſt, qui etiam jure civili a conſortio conjugii exceptus videtur.* So that there ſeems to be not only a *Parity*, but a *Potiority* of Reaſon, when we compare the *Uncle* with his *Niece* and two *Couſin-Germans* together, againſt the Marriage of the two former, acording

Epiſt. 66.

according to the *Levitical* Degrees: Which Argument of his, though ſome would anſwer, by *denying* the unlawfulneſs of the Marriage of *Couſin-Germans*; yet I, who am very firmly of another Opinion, cannot make uſe of ſuch a Plea as that is: But then there are two other things taken together, which will, if I am not miſtaken, give no incompetent Solution of this Difficulty. The firſt is this, That there is a wide difference in the Reaſon of the Thing, as I ſhall prove in the proceſs of this Diſcourſe, betwixt the Marriage of an *Aunt* with her *Nephew*, and of an *Uncle* with his *Niece*; ſo that if the former be a Marriage in the *third* Degree, the latter, though the Conſanguinity or Affinity be the *ſame*, may not improperly be called the *fourth*: For there is no *Compariſon* or *Diſtance* but by *Degrees*; and at that rate the Marriage of an *Uncle* with his *Niece* will be in a manner the ſame with the Marriage of *Couſin-Germans*: But then, if you conſider in the *ſecond* place, that *Couſin-Germans* are a Relation *in plano**, they ſtanding both upon the *ſame Level*, which brings things, as it were, *nearer* to one another, and repreſents Objects in their *full proportion* at a conſiderable diſtance; but the other is a Relation *in declivi*, by which Objects are *leſſen'd* at a

*Or rather the one is an *Horizontal Relation*, the other comes nearer to a *Perpendicular*; the one is a Relation *in eodem plano*, the other is *reſpectus vel ratio plani ſuperioris, ad inferius a latere conſtitutum.*

a *ſmaller* diſtance, and neither appear ſo *big*, nor ſo *nigh* as they are. In this reſpect the Marriage of the *Uncle* with the *Niece* hath much the advantage of that of two *Couſin-Germans*; ſo as the one might be eſteemed *lawful* by reaſon of a greater *ſeeming* diſtance, when the other was *forbidden*.

And now to all that hath been ſaid, there are ſtill Four things to be added, to favour that Opinion which it hath been my chief Deſign hitherto to eſtabliſh, That although ſuch a Marriage ought not perhaps at firſt to have been entred into, yet being once Conſummate by Solemnization, and Fruition conſequent upon it, it ought not to be diſſolved; and that, at the leaſt, it is not ſo very unlawful as the Adverſaries of ſuch Marriages would make us believe.

Servius Danielis in excerpt. a Pithœo cit. Lipſ. ad Tacit. Annal. l. 4.

Firſt then we have it upon the Authority of *Servius*, *Tribus modis apud veteres nuptiæ fiebant*, uſu, Farre, & coemptione, *uſu, ſi verbi gratiâ, mulier anno uno cùm viro, licet ſine legibus fuiſſet, &c.* So that if the Parties Married together, and ſtanding in this Relation, have cohabited for any conſiderable time, this is one great Argument, and hath been all along ſo taken, in the Civil Law, againſt a Divorce, notwithſtanding there be a Fault admitted

in

in their first coming together. And perhaps from the validity of such Marriages *ex post facto*, though at first they were no better than meer Fornications, the obscene use of the Words *Nubo* and *Nuptiæ* in several of the *Roman* Authors was derived; concerning which *Justus Lipsius* hath made this Observation. *Nubendi verbum antiquitus inter ea fuit, quæ custos ille hortorum libentius quam virgines* Vestæ *usurparent. Inde* Festo *nupta verba*, obscæna & Petronio *nuptias facere*, τὸ συνοικίζειν. And to this purpose it is very pertinent, what our Law hath Enacted in the Case of *Præ-contracts*, which not only by the *Canon* and *Civil Law*, but in the Nature and Reason of the Thing, are, and ought to be a Bar to Marriage with any other, without the Consent of the *præ-contracted Party*. For a Man or Woman, after such a mutual *Contract*, have no longer the disposal of themselves, and therefore cannot properly transfer that to another which in themselves they have not; besides, that as no Man ought to break any *lawful* Promise, so certainly no Bargain ought to be *more sacred* than that by which the *Matrimonial Contract* is assured. But yet by reason of many Frauds and Inconveniencies under *colour* of *Præcontracts*, which it was not difficult to get

Antiqu. Lect. l. 2. c. 9. v. & Selden. & Authores ab eo cit. l. 5. de jur Nat. & Gen. c. 4.

32 H. 8. c. 38. two Witneſſes to atteſt, when ever one Party was weary of the other; therefore to prevent ſuch Abuſes for the future, *all* Præcontracts were declared null and void, after the Solemnization and Conſummation of Marriage with another Perſon; and all ſuch Marriages were pronounced valid.

Secondly, What *Abraham* ſaid of *Sarah* his Wife, *Gen.* 20. 12. *And yet indeed ſhe is my Siſter; ſhe is the Daughter of my Father, and not the Daughter of my Mother, and ſhe became my Wife*, is interpreted not only by the *Rabbins*, but by *Joſephus* himſelf, of his *Brother by the Father Side's Daughter*. I do not ſtand to juſtifie this Interpretation, neither do I indeed believe it to be true; but that which I obſerve from it is, firſt, That the Reaſon why both *they* and *Joſephus* have had recourſe to this Interpretation, was to excuſe *Abraham* and *Sarah* from an *inceſtuous* Conjunction; otherwiſe it would have been great folly and madneſs to depart, without any manner of neceſſity, from the firſt and moſt ſimple Interpretation of the Place. Secondly, If we conſider the Age of *Joſephus*, who was preſent at the Siege and Deſtruction of *Jeruſalem* under *Titus*, and wrote his Hiſtory not long after, in the Reign of *Domitian*, by this we are aſſured that this Opinion

Opinion of the *Jews*, That the Marriage of the *Uncle* to his *Brothers Daughter* is not *inceſtuous*, is at the leaſt of about *Sixteen hundred years* ſtanding; and how much elder it is, we cannot tell. Only I ſay again, that I believe, though it was never prohibited, yet it was uſed with great caution by the *ancient Jews*; and that I ſhould always adviſe againſt Marriages of this Nature, if ever I were made acquainted with them before-hand.

Thirdly, The *Canon* of the *Apoſtles* ſo often referred to, and which without queſtion is of great Antiquity, is conceived in theſe Words, ὁ δύο ἀδελφὰς ἀγαγόμενος ἢ ἀδελφιδῆν κλήρικος μὴ ἔστω· *He that marries two Siſters, or his Brother or Siſters Daughter, cannot be a Clergy-man.* So that it is plain by virtue of this *Canon*, that the Perſon ſo married was not to be *Divorced*; only all his Puniſhment, which to the greateſt part was no Puniſhment at all, codſiſted in this, that he was not ſuffered to enter into *Holy Orders*: But for any Man that was a *Lay-man*, and intended to continue ſo, the Marriage of the *Uncle* to his *Niece* was at leaſt *lawful ex antecedenti*, by the plain Conceſſion and Acknowledgment of this *Canon*; and this, for ought appears, though the *Brother* or *Siſters Daughter*, be

underſtood in the moſt *ſtrict* ſenſe of the *Brother* or *Siſter* both by the *Father* and the *Mothers Side*. But if one who was already actually a *Clergy-man*, ſhould engage himſelf in ſuch a Marriage, contrary to the expreſs Inhibition of this *Canon*, then I conceive a Divorce was to enſue, or elſe he was debarr'd the Exerciſe of his Function any longer, or perhaps both of theſe; for the *Canon* ſaith expreſly, κληρικὸς οὐ δύναται, *he cannot*, or ἐν τῷ κλήρῳ εἶναι, *it is impoſſible for him to be a Clergy-man*. I know *Haloander* in his Expoſition of this *Canon* tranſlates ἀδελφιδῶν by *Conſobrinam*, a *Couſin-German*, *cùm vertere debuiſſet fratris filiam*, ſaith *Briſſonius*; and he hath not only *ſaid*, but abundantly *proved* it, by comparing a Teſtimony of *Xiphiline* where he ſaith of the Emperour *Adrian*, τρισὶν ἀδελφιδῶν ἐγγαμήκει, with another of *Ælius Spartianus*, where he ſaith of the ſame Prince, *Trajani per ſororem neptem eum uxorem accepiſſe*: And he confirms and eſtabliſhes this Expoſition ſtill further, by the concurrent Suffrages of *Pollux*, *Heſychius*, and *Moſchopulus*; ſo that it is a very great wonder to me, how *Haloander* came to be guilty of ſo palpable a Miſtake.

De jure Connub. p. 69.

Ib. p. 60.

Fourthly, and laſtly, St. *Ambroſe*, in his Epiſtle to *Paternus*, ſo often appealed to, though

though he uſe all the Arguments he could poſſibly muſter up, to perſuade him not to Marry his Son with his ſaid Son's Niece, by his Siſter on his Father *Paternus* his Side, (a Caſe in which the *Biſhop* of the Dioceſe where *Paternus* lived, and who was firſt conſulted, do's not ſeem to have been poſitive againſt it) yet he ſpeaks not one word of a Divorce, in caſe they ſhould be Married, though he diſſuades from it *ex antecedenti*; and he might have threatned it at leaſt, as a Motive to deter *Paternus* from proceeding any further in that Affair: but that it ſeems, as if, not looking upon a Divorce to be lawful, he would not make uſe of the Fear of it as an Argument to diſſuade from Marriage in this Caſe. And this is ſufficient to ſhew, that no Divorce can be allowed in ſuch a Marriage as this. I will now proceed further, to ſhew a little more particularly than I have done yet, That all ſuch Marriages are *antecedently Lawful.*

But then, by *Lawful*, I mean no more, than that they are not *actually forbidden*, by any *Divine* Law, nor, ſo far as concerns us here in *England*, by any *Humane*; and that they do not come within the rational Intention of either of theſe two Laws. For the firſt of theſe, it hath been ſufficiently inſiſted upon already, and it is plain in it

ſelf, that there is no mention made in the *Law Levitical*, nor in the *Statute*-Law of *England*, which, as to this Particular, takes the other for its Copy, of the Marriage of the *Uncle* with his *Niece*; and then I am ſure it cannot be *actually forbidden*.

As for the Intention of the *Law Levitical*, though I am clearly for admitting a *Parity of Reaſon*, where ſuch a *Parity* can be made out; yet I am afraid, upon a due examination, that it is but an *Imaginary* Parity all this while. For, in the *firſt* place, it is very ſtrange, that there ſhould be ſo expreſs and careful a Prohibition of the Marriage of the *Aunt* with the *Nephew*, as there is in *Levit.* 18. *v.* 12, 13, 14. by which the *Nephew* is forbid to Marry his *Father* or *Mothers Siſter*, or *Uncles Wife*, which is all the *poſſibility* of *Auntſhip* that can be ſuppoſed; and that all theſe Caſes ſhould be ſo expreſly and ſo ſeverely puniſh'd as they are, *Levit.* 20. *v.* 19, 20. and yet no mention in the leaſt made of the *Uncle* Marrying with the *Niece*, whether of *half* or *whole* Kindred, or whether by *Conſanguinity* or *Affinity*, in any wiſe whatſoever: So great Sollicitude on the one hand, ſeems utterly inconſiſtent with ſo great Careleſneſs and Silence on the other, if the Law of *Moſes* had intended to prohibit *both* theſe

theſe ſorts of Marriages alike; Much more muſt it needs have appeared very hard among the *Jews*, as hath been ſaid already, for a Man to be put to death for a Crime, which could not be inferred to be ſo, any otherwiſe than by a *pretended* Parity of Reaſon; for there was no other Puniſhment but *Death* aſſigned in theſe Caſes. And that this *Parity of Reaſon* is not *real*, will appear, in the *ſecond* place, by this; That in the Marriage of an *Aunt* with her *Nephew*, the natural Subordination of Relations is deſtroyed, and the *true dependance* of Things upon one another; a *Superiour*, as the *Aunt* unqueſtionably was, and one that was *loco parentis*, as well by the *Jewiſh* as the *Civil Law*, as I have proved in my *Reſolution of Three Matrimonial Caſes*, was forced to ſubmit not only to all the *Familiarities* of a *Wife*, but alſo to all the *Slaveries* of a *Servant*; for Wives were *no better* according to the *Law* of *Moſes*: Whereas in the other Caſe, of an *Uncle* Marrying with his *Niece*, the *natural* Dependance was preſerved, ſhe being already his *Inferiour* and his *Servant*. The Impiety of this ſort of Marriage of a *Man* to his *Superiour*, and to her that in *legal conſtruction* was *parentis loco*, is thus deteſted by *Papinius Statius*.

Theb. l. 4. ——illum, illum ſacris adhibete neſaſtis,
Quiſ leto dedit enſe patrem, qui ſemet in ortus
Vertit & indignæ regerit ſua pignora matri.

And by *Lucan*,

Pharſal. l. 8. ——Cui fas implere parentem
Quid reat eſſe neſas?——

Which Places, though they be indeed meant of the Mother in the moſt proper ſenſe, yet they may be extended, without immoderate ſtraining, to all that are *parentum loco*. And to this purpoſe the manner of Expreſſion is remarkable, *Lev.* 18 14. *Thou ſhalt not uncover the nakedneſs of thy Fathers Brother, thou ſhalt not approach to his Wife: ſhe is thine Aunt.* As much as to ſay, that though ſhe be of Kin to thee only by *Affinity*, being only thy *Fathers Brothers Wife*, and coming from *abroad* out of a *foreign Stock*, yet ſhe is thine *Aunt*, ſhe is *parentis loco* notwithſtanding; and therefore it is a great Irreverence, and a very high and heinous Breach of Duty and Good Manners in thee, to *uncover her nakedneſs*. And *Phædra* in *Seneca* being deeply enamour'd of her *Son-in-Law Hippolytus*, yet knowing the Diſgrace and Infamy of a *Mother-in-Law* lying down to her *Son*, though this were only a Relation of *Affinity*, and not really ſo *near* a Kin as the *Aunt* by the *Father* or *Mothers Side*, was

deſirous

desirous to forget that name for good and all, for thus she says,

Matris superbum est nomen & nimium potens
Nostros humilius women affectus decet,
Me vel Sororem, Hippolyte, *vel famulam voca.*

Seneca in Hippolyto Act. 2.

Thirdly, In the Marriage of the *Uncle* to the *Niece*, there is a greater fitness for *Propagation*, which is the great and declared end of Marriage, then in that of the *Aunt* to the *Nephew*. And this Argument is never the less cogent, because *Albericus Gentilis*, knew three or four Bonny brisk *Aunts* that were younger then their *Nephews*, and his *own* Aunt, it seems, was one of the number, for a Law is a general Rule, which regards only the generality of instances, without regard to those that are so rare and so seldom to be met with, besides that there are other reasons upon which the Marriage of an *Aunt* with her *Nephew* is prohibited, and where this does not hold, the others do. It is enough that, generally speaking, *Aunts* are *much older* than their *Nephews*, and that Women do not continue fit for Generation so long as Men; by which means it comes to pass, though the Aunt at the time of Marriage, may not in many instances be *effæte* and *barren*, yet she will not continue *Prolifique* so long as a *Niece*, so that here is a double natural obstruction a-

De Nuptiis l. 3. c. 10. p. 347.

gainst

gainſt the Marriage of an *Aunt* with her *Nephew*, which does not hold in that of an *Uncle* with his *Niece*.

Fourthly, If we conſider the ſame man as an *Uncle* with reſpect to his *Niece*, and as a *Nephew* with reſpect to his *Aunt*, here are three terms at a diſtance from each other, and the two extreams are probably very far aſunder; there is in all probability Youth, Beauty, and Virginity on the one hand; and on the other, Old Age, Widowhood, and an imparturient Eſtate, ſo that generally ſpeaking, there is manifeſtly a *greater temptation* to the Marriage of the *Uncle* with his *Niece*, then to that of the *Nephew* with his *Aunt*; therefore if the Law of *Moſes* had intended to forbid the former, as well as the latter, this is that which ought to have been Prohibited in the firſt place, becauſe there is the greater Temptation to it, and therefore the inſtances of Tranſgreſſion muſt of neceſſity be *more frequent*, neither can any thing be a greater diſparagement to the wiſdom of God, than to ſay, that he intended both of theſe ſorts of Marriages ſhould be equally avoided, and yet at the ſame time to inculcate that with ſo much ſeeming induſtry and ſollicitude, of which there was ſcarce any danger, and to omit that wholly without the leaſt word

of

of notice, whoſe danger was ſo apparent, whoſe temptation is ſo ſtrong, and whoſe inſtances without a very ſevere and peremptory Prohibition could not in all Probability be unfrequent.

Wherefore it being ſo clear as it is, that there is *no* parity of reaſon between the Marriage of an *Uncle* with his *Niece* and that of a *Nephew* with his *Aunt*, it is now manifeſt, if we proceed upon the *Levitical* meaſures, that the Divorce of the *Uncle* from his *Niece* is not only indefenſible after they are once Marryed, but that conſidering the *Levitical*, as a poſitive Law, it is lawful *ex antecedenti*, ſince it is neither forbidden in *expreſs* words, neither can it be inferred to be unlawful by *parity of reaſon*, and ſince the meaſures of the *Levitical* Law are in this Caſe of Matrimony the declared meaſures of ours, it follows unavoidably that what is left indifferent in the Law of *Moſes*, preſerves the ſame liberty and indifference in ours, then which I need ſay no more, but becauſe nothing can be too plain or too ſure, therefore I add further, that though there had been ſuch a *parity* as is pretended, yet our Law has no regard to any ſuch way of *illative* proceeding. And this I will prove, Firſt by an inſtance *Forreign* to our Caſe. Secondly, by another inſtance *Bordering*

dexing upon it. And Thirdly by the *expreſs* words of the *Act it ſelf*, where the *Levitical* Prohibitions are made the meaſure of ours.

As to the firſt of theſe, the inſtance I aim at, is this, by an Act of Parliament, 21 *H.* 8. c. 13 it is provided that the *Brethren and Sons Born in Wedlock of every Knight may every of them purchaſe Licence or Diſpenſation* (for the holding of pluralities) *and receive, take, and keep, two Parſonages or Benefices with cure of Soul.* But now it is a ruled Caſe that a *Baronets Son* or *Brother* ſhall not enjoy this Priviledge, notwithſtanding the reaſon of it was manifeſtly *honourary*, and a *Baronet* ſhall take place of a *Knight*, beſides that the one is *hereditary* which the other *is not*; ſo that here is not only unqueſtionably a *parity*, but a twofold very great *potiority of reaſon*, in the behalf of the *Baronets Son or Brother*, and yet the Law adheres ſo ſtrictly to the Letter, that he ſhall enjoy no priviledge by virtue of this Statute.

I know it is ſaid that this Statute is an *encroachment* upon a *common right*, there being no natural reaſon why one man ſhould have two Livings more than another, and therefore it ought not to be extended further than the Letter: But then it is to be conſidered, that this reaſon will hold as well in

natural

natural as in *positive* obligations; for the Laws of nature, as such, oblige only by *natural sanctions*, neither is any man punisht for the breach of any Law of nature, *as such*, by an *humane* or *divine positive* Law, but as that Law of nature ratified by *Divine Authority* or *humane appointment*, is made *positive* and hath a *positive Sanction* annexed to it, so that let a Law oblige *naturally* never so *much*, yet to oblige any man not to break it by an humane Law, without which an humane Law *cannot* punish the offence, is manifestly a restraint laid upon that *possible* and *humanely lawful* liberty of action which he had before, and therefore the humane obligation cannot extend further then the Letter of the Law, for what the Law hath *not restrained* it leaves still *indifferent*, and it is true of *humane Laws*, with respect to *natural* as well as *positive* obligations, *in lege prohibitoriâ quodcunque non prohibetur, intelligitur permissum.*

Secondly, To come nearer to our present Case, the intermarriage of *Brother* and *Sister* to *Sister* and *Brother* among us, as likewise of the *Son in Law* to the *Mother in Laws Daughter* or *Father in Laws Daughter* are clear instances that our Law does not proceed by *parity of reason*; for all these are manifest violations of one of those *great* and

Or of two Brothers to two Sisters.

and *fundamental* reaſons of all thoſe prohibitions, which was to ſpread Friendſhips and propagate Goodwill and Charity among Men, by not reſtraining the *Matrimonial affinities* within too *narrow* a compaſs.

Thirdly, In the Law it ſelf, which is the 25 of *H.8.* c. 22. the particulars there ſpecified are uſhered in with a, *that is to ſay*, and in the Concluſion of it, there is a reference made to them by the Word, *afore rehearſed and above expreſſed*: now if any man will ſhew me, that the words, *that is to ſay*, were ever referr'd to any other than the particulars thereafter expreſly declared, without reſpect to any *dark* intimations by *parity of reaſon*, or if the word *afore rehearſed or above expreſſed* were ever in any Act, or other *good* Writing of Law, referred to *any other* Particulars, than what were *before* in the *ſaid* Act, or Writing *expreſly* enumerated, than I will yield the Cauſe, notwithſtanding what ever elſe hath been ſaid in its defence; but if theſe words are *no where* uſed *otherwiſe* than I have ſaid, and by *conſequence cannot* be ſo *here* neither, then I am as certain as the *Law* can make me, as certain as the *plaineſt evidence* of demonſtration can be, that I muſt undeniably and infallibly carry it.

Beſides, that all this is ſpoken in defence of the Marriage of an *Uncle* with his *Niece*, *ex poſt facto* at leaſt, for though it may be defenſible, though that Niece ſhould be the Daughter of a Brother or Siſter German by Father and Mothers ſide, yet I would not adviſe, or ſo much as yield to it before hand; but our caſe is ſtill more favourable, we are the *Niece* only by the *Half-blood*, and that not the Blood of the *Mother*, but the *Father*, which, becauſe the *more uncertain*, is in all theſe Caſes the *more favourable* of the two, which was the foundation of *Abrahams* juſtification of himſelf to *Abimelech* the King of *Gerar*, *ſhe is the Daughter of my Father, and not the Daughter of my Mother, and ſhe became my Wife*, as much as to ſay, according to the cuſtom and uſage of thoſe times,

times, that the *one* is *not* a Sister prohibited in Marriage, though the *other be*, or that the *Sister by the Fathers side* is not *legally* so near a kin as the *Sister by the Mother*. So *Albericus Gentilis* determines in this very case, *ut eanto minus fuerit peccatum, quanto est carnis conjunctio simplicior & minor a patre.* And in another place, in his Paraphrase upon one of the *Levitical* prohibitions he says. *Filiam matris tuæ, hoc est, uterinam sororem ne accipias, pari ratione* (cum filia patris tui) *aut forte etiam majori: quia conjunctio carnis major ex parte est matris*; and this was perhaps one reason among others, why the Marriage of *Claudius* with *Agrippina* his Brothers Daughter was not only ratify'd, but perswaded by the *Senate*; for *Tacitus*, *Suetonius* and *Zonaras* do all of them speak of it after such a manner, as if he were almost compelled to what he did by the importunity of the Senate and People: which I, for my part, when it was so unanimous, can scarce believe to have been dissembled, especially to so easie a Prince as *Claudius* is represented, I am sure we do not live in such *flattering* times, though we have the Honour and happiness of *much better* Princes to sway the Scepter over us, than ever the *Romans* could boast of, and the example had been like to have been imitated afterwards by that good Prince *Titus Vespasian*, who recommended his Daughter for a Wife to his Brother *Domitian*, though he did not think fit to accept of her in any higher quality than that of a Mistress, which, as to the business of *Incest* was the *same* thing.

De Nupt. L. 5 c. 10. p. 540.

lb. c. 8. p. 522.

Tacit. Annal. L. 12. Sueton & Zonar. in Claudio.

Sueton. in Domitiano, juxta finem.

Besides, that several of the *after Emperours* did confirm this Licence, (though afterwards it were restrain'd and prohibited again by others) as appears by the Edict of *Diocletian* and *Maximian* publisht in the Fragments of *Pythæus*, where the marriage of the *Sisters Daughter*, (not that of the Brother) is only forbidden. And *Ulpian* saith, speaking of his own time, *nunc ex tertio* (gradu) *licet uxorem ducere*, where when *Cujacius* would correct it *Quarto*, he is deservedly

Mosaic. & Roman. legg. collat. tit. de incest. Nupt. p. 92

Alberic. Gent. de Nupt. l. 5. c. 10 p. 339.

deservedly chastised for it by *Albericus Gentilis*, for *Ulpian* certainly meant, that it was lawful *in his time* to marry the *Brothers Daughter*, though *not* the *Sisters*. Nay, that even in *Justinian's* time the Female Consanguinity was more Sacred, and the conjunction with it more *Incestuous* than the *Male*, though it is true, the Marriage of the *Brother's Daughter* were in his time forbidden likewise, appears by this resolution of *Papinianus ad Plautium*. *Sororis proneptem non possum ducere uxorem, quoniam parentis loco ei sum.* He do's not say, *Fratris proneptem*, but *Sororis*, implying the latter to be much more *Sacred*, and more *indispensably prohibited* than the former. Neither can any reason be given why *Caracalla*, who married his *Mother-in-law*, was never imitated so commonly as *Claudius*, bating the difference of Age betwixt a *Mother-in-law* and a *Niece*, but that the *one* was always look'd upon to be much more *foul* and *incestuous* than the *other*.

Tit. de ritu Nupt. l. 39.

V. Spartian in Caracalla.

Lastly, St. *Ambrose* dehorting *Paternus* from marrying *his Son* to his the said *Son's Sisters Daughter* by *Paternus the Fathers* side, which was but the *Half-blood*, durst not say positively, that it was against Law, (though it were a Sisters Daughter) as this is not, being only the half Sister by the Fathers side. *Hic autem gradus tertius est, qui etiam civili jure a consortio conjugii exceptus videtur.* And now I conclude from the Premises, that the Marriage of the *Uncle* to his *Half-brother by the Father's sides Daughter* cannot without Ignorance or Wickedness and in either Case without palpable injustice be Vacated or Dissolved.

JOHN TURNER.

FINIS.